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## JUDGES IN THE EXECUTIVE COUNCIL OF UPPER CANADA

**W**HEN in December, 1791, Upper Canada began her separate provincial career, her first Lieutenant-Governor, Colonel John Graves Simcoe, said that the Constitution of the Province was "the very image and transcript of that of Great Britain."<sup>1</sup>

This, theoretically, was true; the Canada or Constitutional Act of 1791<sup>2</sup> provided for a Governor corresponding to the King, a nominated Legislative Council with life tenure corresponding to the House of Lords, and an elected Legislative Assembly corresponding to the House of Commons. In legislation the parallel was fairly complete;<sup>3</sup> but in administration there was a very great difference.

In England the "Cabinet" system had been established shortly after the Revolution of 1688—the advisers of His Majesty, the ministry, the administrative officers, were responsible to the House of Commons and must retain the confidence of that House; they were one body and must stand or fall together. Nothing of the kind was provided for Upper Canada.

In the old Province of Quebec<sup>4</sup> the Governor had had an Executive Council selected for him, generally at his own instance; the

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<sup>1</sup> See speech from the throne on proroguing the first Parliament of Upper Canada, October 15, 1792, 7 Ont. Archives Report (1910), p. 11; 6 do., do. (1909), p. 18. Upper Canada then *de jure* extended only to the middle line of the Great Lakes and connecting rivers, but *de facto* it took in Detroit and Michilimackinac and their "dependencies" until given up in 1796 under Jay's Treaty.

<sup>2</sup> (1791) 31 George III, c. 31 (Imp.), Shortt & Doughty's Constitutional Documents, 1759-1792, 2nd Edit., Ottawa, 1918, pp. 1031-1052.

<sup>3</sup> The Lieutenant-Governor, indeed, sometimes reserved bills (passed by both Houses of Parliament) for the royal pleasure; and some of these were disapproved, nominally by the King, but in fact by the imperial administration, whereas there had been no royal disapproval of a bill passed by the Imperial Parliament from the times of William III.

<sup>4</sup> Formed originally by the Royal Proclamation of October 7, 1763, Shortt & Doughty's Constitutional Documents, 1759-1792, pp. 163-168, largely increased in size by the Quebec Act (1774), 14 George III, c. 83 (Imp.); do., do., pp. 570-576.

Canada Act (Sec. 50) contemplated a like council in the new Province, an Executive Council to "be appointed by His Majesty for the affairs of such Province."

The members of this Council were in no way responsible to the people, either directly or through their representatives in the House of Assembly; they were responsible only to the King as represented by the Lieutenant-Governor, just as the "Secretaries" at Washington are responsible to the President alone and not to the people directly or through their representatives in Congress. This was, of course, the original system in England before responsible government was established.<sup>5</sup>

In the Executive Council selected for Colonel Simcoe was William Osgoode, Chief Justice of the Province, and thereafter, nearly as long as Upper Canada had a separate provincial existence, the Chief Justice of the Province was an Executive Councillor.

While the Lieutenant-Governor was head of the state, his Instructions specifically required him to act with the advice of the Executive Council in constituting townships or parishes, erecting fortifications, creating courts criminal and civil and of law and equity, appointing officers for such courts and granting land (this last being of the greatest importance); but he might act without such advice in dividing the Province into constituencies to return members of the House of Assembly, in raising armies and navies, exercising martial law, appointing captains, lieutenants and other officers, giving warrants for payment of public moneys, assenting to, refusing assent to or withholding any bill passed by the two Houses, appointing judges, justices of the peace, etc., pardoning offenders and remitting fines, establishing fairs and markets and removing or suspend-

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<sup>5</sup> The "Cabinet" system never prevailed in the Province of Upper Canada before the union of the two Canadas under the Union Act of (1840), 3, 4 Vict., c. 35 (Imp.). John Beverley Robinson when Attorney General "denied the existence of a ministry in the Province and claimed the right to act solely upon his own individual responsibility in the House and without reference to any supposed necessity for agreement with his colleagues." Lindsey's "Life of William Lyon Mackenzie," 2nd Ed. (Makers of Canada Series), p. 274. We shall see, however, that a few years later he was forced to resign from the Executive Council to carry out the wishes of the government.

ing any officer.<sup>6</sup> Substantially all the important civil business was thus in the hands of the Executive Council.

In addition to being a member (and president) of the Executive Council, Osgoode was also in analogy with the Lord Chancellor at Westminster made a member and Speaker of the Legislative Council, where it was his duty to introduce and explain the bills promoted by the Executive Council. In this office he was succeeded by the succeeding chief justices almost as long as Upper Canada existed as a separate Province.

There was no objection on the part of the people (so far as extant records show) to Osgoode's being an Executive Councillor (1792-1794) nor to his successor, John Elmsley (1796-1802); but Henry Allcock (1802-1806) was not so fortunate. William Weekes, a turbulent Irishman, who was a former student of Aaron Burr's, Joseph Willcocks, a former "United Irishman," and Mr. Justice Thorpe, another Irishman,<sup>7</sup> with a few others of less note, were all "agin' the gover'ment," and Allcock came in for his share of abuse.

But this was mere general abuse based upon his supposed services to Lieutenant-Governor Hunter and his being a member of the Council advising Lieutenant-Governor Hunter and Alexander Grant, the Administrator of the government between Hunter's death in 1802 and the arrival of his successor, Francis Gore, in 1806, no constitutional question was raised.

Allcock's successor, Thomas Scott (1806-1816), got into trouble with the House of Assembly in 1812 by releasing on *habeas corpus* Robert Nichol, who had been committed to the common gaol at York (Toronto) for breach of the privileges of the House of

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<sup>6</sup> See Royal Instructions to Lord Dorchester, September 12, 1791, 4 Ont. Arch. Rep. (1909), pp. 161-169; and Instructions to John Graves Simcoe, same date, do., do., p. 161.

<sup>7</sup> Weekes, the first law student called to the bar by the Law Society of Upper Canada (1799), was shot in a duel (1806) by his friend and colleague, William Dickson, at Fort Niagara, N. Y. Willcocks became an open traitor in the War of 1812 and was found dead in an American colonel's uniform after the attack on Fort Erie in 1814. Thorpe was "amoved" from his office; he was appointed Chief Justice of Sierra Leone in Africa, but came back to England in two years with some complaints about the government, and was cashiered. Thereafter he lived in London in obscurity.

Assembly in using disrespectful words concerning it. Samuel Street, the Speaker, had issued his warrant for the purpose and Nichol went to gaol; but on a writ of *habeas corpus* issuing under the Statute 31, Charles II, Chief Justice Scott, finding the warrant defective, discharged Nichol. The House was very indignant and resolved that the Chief Justice was "guilty of a violent breach of the privileges of this House." They passed an address of complaint to the Prince Regent (the King, George III, was insane); but Scott was right and the House was wrong; and soon the more important matters of the War of 1812 called the attention from this petty quarrel.<sup>8</sup>

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<sup>8</sup> The warrant of commitment, signed by Samuel Street, the Speaker of the House of Assembly, was general; it did not set out the privilege violated, the judgment of the House, etc., etc., as it should; and the Chief Justice was bound to give effect to the objection and to release the prisoner. For the proceedings in the House of Assembly, see Journal of the House of Assembly, Upper Canada, 9 Ont. Arch. Rep. (1912), pp. 41, 42, 43 (where the warrant is set out), 57, 58, 69, 70, 78, 79, 82, 87, in the Legislative Council, Journal of the Legislative Council of Upper Canada, 7 Ont. Arch. Rep. (1910), pp. 425 (where Scott's explanation is set out), 426. The Chief Justice also explained his action to the home authorities satisfactorily. Scott was a member of the Executive Council when he was Attorney General and before he was elevated to the bench.

The Journals of the House of Assembly for Upper Canada up to and including 1824 are published in convenient form in the reports of the Ontario Archives for 1909, '10, '11, '12, '13, '14; from 1825 on they must be read in the folio original. A reprint of these is much to be desired for the study of the interesting period of the history of Upper Canada in the decade before the rebellion of 1837.

That the court and any judge of it were compelled in law to grant a writ of *habeas corpus*, "a prerogative Writ of Right," to anyone imprisoned on the order of either House of Parliament, was decided as long ago as 1771 in the case of Brass Crosby, Lord Mayor of London, 3 Wilson's Reports, 188; 2 Blackstone's Reports, 754; as also that a legal cause of detention must appear upon the return of the writ (warrant of committal, etc.) or the prisoner be discharged; but it was also clear law that (in England at least) the order of either House was a conviction, into the validity of which the court would not inquire (R. v. Flower, 1799, 8 Term Reports, 314). The only thing to be looked at by the court was the return. As long ago as the reign of Charles II, in 1670, it was decided in Bushel's Case, Vaughan's Reports, 135, that the cause of imprisonment ought to be specifically stated. Chief Justice Scott was bound to give Nichol his liberty when he found the warrant of commitment defective.

But neither Scott nor any of his predecessors was believed to have any part in directing the policy of the Governor; and so he, like them, escaped an attack on constitutional grounds.

William Dummer Powell, the fifth Chief Justice (1816-1825), was in different case. Born in Boston, Massachusetts, in 1755, of good Tory stock, he was educated there, in England, and on the Continent; he was a student of the last royal attorney general of Massachusetts when the American Revolution broke out; he at once took up arms on the loyalist side. During the war he went to England and read law; came to Quebec and then to Montreal, where he practiced law till 1789, when he was appointed First Judge at Detroit for the District of Hesse. When the courts of Common Pleas were abolished in 1794 he became the first *puisne* justice of the new court of King's Bench, the chief being the Chief Justice of the Province yet to be appointed.

In 1807 Sir Francis Gore, the Lieutenant-Governor, recommended that he be appointed to the Executive Council as an honorary member—*i. e.*, without pay; and next year he was appointed.<sup>9</sup> Powell was still senior *puisne* justice of the King's Bench. He was as influential with Gore as Gore allowed anyone to be, by no means so influential as he was supposed to be, for he was considered the master of the administration, the power behind the throne. When Gore was succeeded by Isaac Brock in 1811, Powell was even more powerful; it is almost certain that it was he that drew the spirited reply of Brock to General Hull's bombastic proclamation, and he took a very active part in all public matters throughout the war. *Inter arma silent leges*—and also private feuds. After the war, during Gore's second residence in the Province as Lieutenant-Governor, Powell was promoted to be Chief Justice (1816).

During the administration of Samuel Smith (1817-1818) and the earlier part of that of Sir Peregrine Maitland, Powell was credited with great influence in the Council, and indeed until within two

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<sup>9</sup> Letter of Gore to William Windham, Secretary of State, from York, June 22, 1807, Can. Arch. Q. 306, p. 178; Gore to Castlereagh, Secretary of State, York, February 29, 1808, Can. Arch. Q. 311, I, p. 29; Order in Council, September 14, 1808, Can. Arch. Q. 311, II, p. 447. His formal "mandamus" was dated March 1, 1809, Can. Arch. M. 761. I confess to special interest in Powell: he was the first and I the last justice of the King's Bench.

years of his resignation in 1825 the suspicion was by no means without justification. He was often the subject of attack for the measures of the government; but it was not till the time of his successor that the constitutional objection was raised.

That the "Cabinet" view of the executive had not yet made its appearance is manifest from the fact that Powell strenuously opposed measures promoted by the Governor—and went so far as to enter "dissents" on the records of the Legislative Council, of which he was Speaker.

Chief Justice Campbell, a Scotsman, came to Upper Canada as a *puisne* justice of the King's Bench in 1811. He was recommended for the Executive and also the Legislative Council in 1814; but he was passed over and did not become a member of either until he was appointed Chief Justice late in 1825.

Campbell was not a pushing man, but he was early assailed in the House and the Province—not, it must be said, on account of sins of omission or commission of his own. The general election of 1824 had resulted in a victory for the party discontented with the government; Powell was *persona non grata* with this party and they were "after him"; he, however, escaped during the first session, and the blow intended for the second session he avoided by resignation. His successor was substituted for him and received his punishment. It must be said, too, that there was a sentiment already developing, although it seldom found definite articulate expression, in favor of responsible government. January 13, 1826, the House of Assembly passed by a vote of 23 to 14 the resolution, "That the connection of the Chief Justice with the Executive Council, wherein he has to advise His Excellency upon executive measures, many of which may bear an intimate relation to the judicial duties he may have thereupon to discharge, is highly inexpedient, tending to embarrass him in his judicial functions and render the administration of justice less satisfactory, if not less pure."<sup>10</sup> The House by

<sup>10</sup> Journals, House of Assembly, U. C., 1825-6, p. 72. All the radicals were for the resolution and all the Tories against it; the same day the House passed *nem. con.* the resolution, "That it is highly expedient that the judges of the King's Bench in this Province should be as independent of the Crown and of the people as are the judges of England," do., do., p. 73. The judges in Canada might yet be suspended by the Governors and dismissed by the Crown (*i. e.*, the home administration) at will; two judges

the same vote resolved that "an humble address \* \* \* be presented to His Majesty humbly praying that he will be graciously pleased to discontinue to impose on the Chief Justice duties so incompatible with his judicial character and so ill-suited to the state of this Province."<sup>11</sup> An address in these terms passed, January 14, on a vote of 20 to 13.<sup>12</sup> The Lieutenant-Governor, Sir Peregrine Maitland, informed the House in the speech from the throne on proroguing Parliament, "I will transmit to Earl Bathurst (the Secretary of State for War and Colonies) your address to His Majesty on the subject of \* \* \* the functions of the Chief Justice in this Province; but I am not enabled to explain to His Majesty's government what there is peculiar in the present state of this Colony which you allude to in the conclusion of your address as inducing you to desire the change which you solicit."<sup>13</sup>

Maitland duly transmitted the address, but deprecated the proposed change, saying that he required the advice of the Chief Justice in the management of the public business.<sup>14</sup>

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had been so "amoved"—for good cause, indeed, but the system was dangerous. The judges of this Province have always been independent of the people, and the Act of 1834, 4 Will. IV, c. 2, s. 1 (U. C.), rendered them irremovable by the Governor without an address of both Houses of Parliament. Journals, House of Assembly, U. C., 1825-6, p. 73.

<sup>11</sup> "Humble address," "humbly praying," the usual camouflage of our British ways. I never saw an humble Canadian politician, but they "humbly" pray in the same way as we write "My Dear Sir" to one we loathe and are the "obedient servant" of one we despise.

<sup>12</sup> Journals, House of Assembly, U. C., 1825-6, pp. 75, 76. Marshall Spring Bidwell was absent from the House; Charles Fothergill, too late, was afraid of losing his position of King's printer (which he did in consequence of his vote for the resolution), and Charles Ingersoll, of Oxford, did not vote; these reduced the vote to 20; all the good Tory votes were in evidence. Two thousand copies of the resolution and address were ordered to be printed January 15, do., do., p. 8.

<sup>13</sup> Do., do., p. 117; see also Can. Arch. Q. 340, I, 39-41. Maitland had them there; and as he prorogued the Parliament at once they could not reply or explain—if, indeed, they could explain—for there was nothing in the condition of the Province different in 1826 from any other time, or in that of Upper Canada differentiating it from any other colony. The concluding words of the resolution were so much verbiage.

<sup>14</sup> See Maitland's dispatch to Bathurst (No. 2) from York (Toronto), March 7, 1826. Can. Arch. Q. 340, I, pp. 39-41. See also dispatch, same to same (No. 5), York, March 10, 1826. Can. Arch. Q. 340, I, pp. 222, 232.

Bathurst answered, "that it is highly expedient that the Governor should have the advice and assistance of the first law authority of the Province for his guidance in the administration of his government; that the greatest advantage has been derived in the colonies from this assistance, and that it does not appear that there is anything peculiar in the state of Upper Canada which should make it advisable that this system should be changed." Maitland duly transmitted the dispatch to the House, the House duly thanked him, and the matter was not further canvassed in Parliament in the session of 1827.<sup>15</sup>

But the country was not wholly silent; and in the next session the House passed a resolution, "That the Executive Council is appointed by His Most Gracious Majesty to advise His Excellency upon the affairs of this Province; and that the connection of the Chief Justice of this Province with the Executive Council wherein he has to advise His Excellency upon executive measures, many of which may bear an intimate relation to the judicial duties he may have thereupon to discharge, is highly inexpedient, tending to embarrass him in his judicial functions and render the administration of justice less satisfactory, if not less pure." An address to the King on these lines was voted by 19 to 6. This address (not the resolution) repeated the unnecessary and misleading reference to "the present state of the Province" which had given Maitland and Bathurst an advantage; and, naturally, the Governor, in promising to transmit the address, said, "I am not yet enabled to explain to His Majesty's Government what peculiarity in the present state of this Colony you allude to as inducing you to desire the change which you solicit."<sup>16</sup>

Maitland in transmitting<sup>17</sup> the address to William Huskisson (who had, August 17, 1827, replaced Viscount Goderich, the suc-

<sup>15</sup> Dispatch from Bathurst to Maitland, Downing Street, June 8, 1826. Journals, House of Assembly, U. C., 1827, p. 10. For its transmission to the House, December 12, 1826, see Journal. Ho. Assembly, pp. 1, 4, 5, 7, 9. Five hundred copies were ordered to be printed for the use of the members, do., do., p. 12; the Governor was thanked, pp. 13, 15, 16.

<sup>16</sup> Journals, Ho. Assembly, U. C., 1828, pp. 100 (the resolution), 102 (the division and the address), 109 (Maitland's answer).

<sup>17</sup> Dispatch (No. 24), Maitland to Huskisson, York, May 15, 1828. Can. Arch Q. 347, pp. 39-43.

cessor of Bathurst, April 30, 1827, as Secretary of State for War and Colonies), said that the subject awakened no public interest (in which he, relying upon the official class, was wrong) and that the address passed almost without debate (in which he was right, but it was because of the feeble opposition offered to its passage).

This Parliament was dissolved in July, 1828, and a general election was held in the same year.

Chief Justice Campbell was growing old, or thought he was, for men grew old sooner in those days—they ate too much and (especially) drank too much, and were filled with malaria from mosquitoes. Campbell, just turned 70, was tired of official life and desired to be allowed to resign on a pension.<sup>18</sup> The Attorney-General, John Beverley Robinson, was recommended to fill the vacancy, if a vacancy should be allowed.<sup>19</sup> But Campbell had to undergo one more session of Parliament before finding surcease from his political troubles. The new Parliament met in January, 1829. Maitland had gone home and had been succeeded by Sir John Colborne (afterwards Lord Seaton), an old Peninsular War officer, in November, 1828.

We shall see that already the affairs of Upper Canada as well as those of Lower Canada, in this as in other matters, were receiving the attention of the Imperial Administration and Parliament, but I do not here interrupt the narrative of proceedings in the Colony.

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<sup>18</sup> It should, perhaps, be said that Campbell was a private in a Highland regiment and came to America with his regiment to take part in the Revolutionary War; he was under Cornwallis when that general surrendered at Yorktown in 1781, and suffered harsh treatment while a prisoner. He obtained his release in 1783 when peace was proclaimed, and went to Nova Scotia, where he was called to the bar and rose to eminence in his profession. He was made a *puisne* judge in Upper Canada in 1811. He was the first of our Chief Justices to be knighted. See Can. Arch. Q. 350, pp. 118, 122, 131, 132.

<sup>19</sup> See dispatch, Maitland to Sir George Murray (who had replaced Huskisson as Secretary of State May 30, 1828), from Queenstown, August 15, 1828. Can. Arch. Q. 347, p. 88.

Robinson could have had the chief justiceship in 1825 when Powell retired, but he declined; it was generally understood that Campbell was a "warming pan" for him. Maitland says of him in 1828 that he was willing to wait, Can. Arch. Q. 347, p. 88. Campbell expected a retiring allowance of £1,250, Can. Arch. Q. 353, p. 130; and got it, do., do., p. 66.

Colborne sent to the House, at their request, a copy of the answer of the home government to the address of 1828—"with respect to the Chief Justice retaining his seat in the Executive Council, it is a question which His Majesty's Government have taken into their consideration, and on which they must at present suspend their opinion."<sup>20</sup> In this Parliament appeared William Lyon Mackenzie as a member. He was a leader of the radical section of the Province and openly advocated "such a change in the mode of administering the government as would give the people an effectual control over the actions of their representatives and through them over the actions of the executive." Neither he nor the House generally were at all satisfied with the reply; but as the matter was under consideration by the home government, no further formal steps were taken during that session specifically in respect of the Chief Justice. All through the session, however, it was obvious that there was a deep-seated distrust of the Executive Council and dissatisfaction that it was wholly beyond the reach of any majority of the House. Mackenzie and Robinson, the Attorney-General, may fairly be called the protagonists of the two parties of reform and of privilege, the latter being in a permanent minority in the House of Assembly, but in full control of the Legislative and (of course) the Executive Council.

An address was passed to His Excellency asking him "to inform this House who form the Council appointed under the Constitutional Act, 31 George 3rd., chap. 31, to advise your Excellency upon the affairs of this Province." Colborne promised to lay the information before the House, and did so some ten days later. This showed that there were five executive councillors, including the Chief Justice.<sup>21</sup> This address was part of the general move-

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<sup>20</sup> Journals, Ho. Assembly, U. C., 1829, pp. 6, 16, 17 (the reply of the home government). The House had hoped and entertained "an anxious belief that under the auspices of His Excellency \* \* \* the administration of justice will rise above suspicion." This was by a vote of 36 to 6, the Attorney General, John Beverley Robinson, and five others of the "Old Guard" voting in the negative (one of them afterwards himself a Chief Justice in better times, Archibald McLean, 1862-8).

<sup>21</sup> They were James Baby (1794), Rev. John Strachan (1817), Chief Justice William Campbell (1825), James Buchanan Macaulay (1825), afterwards Chief Justice; Peter Robinson (1827), brother of the Attorney Gen-

ment for responsible government now become articulate, in great measure owing to the efforts of Mackenzie.

This would seem to be the proper place to sketch the proceedings in England in reference to the question.

There were constitutional troubles in Lower Canada not dissimilar to those in the Upper Province, but more acute, being to a certain degree accentuated by differences in race and creed. Representations were made to the home administration and the British people from both the Canadas, and May 2, 1828, Huskisson, Colonial Secretary in Wellington's administration, as he had been under Goderich, brought the question of the civil government of the Canadas up in the House of Commons as "involving the well-being and happiness of nearly a million of British subjects." He said that "in all parts of Canada the present system works so ill as to stand in need of alteration"; he repudiated the proposition to abandon the Canadas, which could not be done "without doing an injustice to their fidelity and tried attachment or without tarnishing the national honor." He moved for a select committee to inquire into the state of the civil government of Canada. Henry Labouchere (afterwards the first Baron Taunton), a leading member of the Opposition, agreed that "as long as Canada desired British connection, this country could not desert her." A select committee was appointed by unanimous consent, under Huskisson as chairman. "The Canada Committee," as it was generally called, reported, recommending amongst other things that judges should not sit in the Executive Council.

In the succeeding session at Westminster, February 23, 1829, Labouchere asked Sir George Murray, who had replaced Huskisson, May 30, in the preceding year (Huskisson disagreed with Wellington, the Prime Minister, over the Corn Laws, he being a free-trader), whether the government were to introduce a bill on the subject. Murray said that they were collecting information. The matter came up again, April 6, on a vote to improve water communication, with the same result. May 14 a monster petition signed by 3,110 persons at York (Toronto) was presented to the House by Edward Stanley (then member for Preston and after-

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eral, and George Herchmer Markland (1827). For the proceedings, see Journals, Ho. Assembly, U. C., for 1829, pp. 40, 42, 49 and 47.

wards thirteenth Earl of Derby), which asked amongst other things that judges should not have a seat in the Executive Council. The essence of the petition was local responsible government in the Colony. Murray agreed that there were good grounds of complaint, said that he was "of opinion that judges should not be of the Executive Council," and after some discussion the petition was withdrawn. Later in the session, June 5, Labouchere brought the matter up again, and Murray emphatically declared that it was his intention to bring forward some measure when he was in possession of sufficient information to enable him to frame one.<sup>22</sup>

Murray did not communicate to the Lieutenant-Governor his determination to exclude judges from the Executive Council, nor did he inform the Attorney-General, who believed that it was not intended to act on the report of the "Canada Committee."

The scene now changes to Upper Canada. Colborne in his official dispatches did not hesitate to say that most of the trouble in the House of Assembly was due to "the editor of a York paper so as to keep up a spirit of discontent",<sup>23</sup> and he did not exaggerate so very much.

During the Parliamentary recess the agitation for responsibility of the Executive to the House of Assembly was kept up; and it was still further accentuated by the elevation of the Attorney-General to the Chief Justiceship in July, 1829. Colborne hoped to make the Executive Council (as well as the Legislative Council) more satisfactory by gradually increasing the number of members; but this course did not meet with approval in Downing Street.

On January 12, 1830, the fourth day of the following session, the House passed a resolution (on a vote of 25 to 6) that it felt "unabated solicitude about the administration of public justice,"

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<sup>22</sup> See Hansard's Parliamentary Debates, New Series, Vol. XIX, col. 300, 308, 315, 316, 318; Vol. XX, col. 496; Vol. XXI, col. 460-463, 1331-1335, 1764-1766.

<sup>23</sup> See dispatch (No. 4), Colborne to Murray, from York, February 16, 1829. Can. Arch. Q. 351, I, 29. In the same dispatch Colborne said that the Chief Justice should continue to retain his seat, although at times he must be led too deeply into political matters, which in our day would be a conclusive reason why he should not retain his seat.

Private letter, Colborne to the Secretary of State, Sir George Murray, from York, December 9, 1829. Can. Arch. Q. 352, p. 261.

and was convinced that the "continuance about His Excellency of the same advisers who from the unhappy policy they have pursued have long deservedly lost the confidence of the country, is highly inexpedient and calculated seriously to weaken the expectations of the people from the impartial and disinterested justice of His Majesty's government," and it went so far as to refuse (on a vote of 28 to 3) "to accept as a Chaplain anyone appointed by the Executive Government." His Excellency curtly said, "I return you my thanks for this Address," and nothing more was done during that session specifically in reference to the Executive Council.<sup>24</sup>

In the House of Commons at Westminster the advocates of responsible government in Canada were not silent. May 25, 1830, Labouchere moved three resolutions (1) directed against "placemen" being in the majority in the Legislative Councils of the two Canadas, (2) "that it was the opinion of the House that it is not expedient that the Judges should hold seats in the Executive Councils of Upper and Lower Canada, and that with the exception of the Chief Justice they ought not to be involved in the political business of the Legislative Council," and (3) that these measures should be carried out without delay. Lord Sandon (Dudley Ryder, afterwards second Earl of Harrowby), M. P. for Tiverton, seconded the motion and pointed out the anomaly that "the same person advised in the morning in the Executive Council that certain laws should be proposed, voted upon them in the afternoon in the Legislative Council, and administered them in the evening on the Bench." He quoted from Blackstone: "Nothing is more to be avoided in a free constitution than uniting the provinces of a judge and minister of state," and said that this was not a mere theoretical evil, that the greatest practical evils had already resulted from it, the judges had been converted into active political partisans (the converse was in fact true in Robinson's case), they talked in the legislature of the way in which they meant to interpret the laws upon the bench, and all confidence in the purity of the administration of justice in cases where the government was a party had

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<sup>24</sup> Journals, Ho. Assembly, U. C., 1830, pp. 10-14. For the debate in the House of Commons, see Hansard, Parl. Deb., New Series, Vol. XXIV, cols. 1093-1111.

been destroyed. Sir George Murray replied, admitting the impropriety of judges (except the Chief Justice) in the Legislative Council; but he opposed the resolutions as conveying an implied censure on the government. Labouchere, closing a lively debate, said that the evils of allowing judges to have seats in the Executive Council were so great that he would press his motions. They were lost by a vote of 155 to 94.

The discussion in the House of Commons was not without its effect.

The debate was variously reported in the newspapers; a rumor became current that the Chief Justice of Upper Canada was not to retain his seat in the Council. Robinson applied to Colborne to know if any instructions had been received on the subject, and being informed that there were none he continued to fill the position. It has already been pointed out that Murray did not tell Robinson that the recommendation of the "Canada Committee" was to be carried out in the Canadas.

Colborne, indeed, had protested against his suggested removal on the ground that the Chief Justice was chairman and most of the business was connected with legal questions, and the public would suffer considerably if such a change were made.<sup>25</sup>

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<sup>25</sup> Dispatch, Colborne to Robert William Hay (who became Secretary for War and Colonies in 1825 and continued in office until 1835), from York, September 17, 1830. Can. Arch. Q. 354, p. 270. Robinson's letter as to the discussion in the House of Commons, do., do., p. 271.

James Buchanan Macaulay (afterwards Chief Justice Sir James Buchanan Macaulay) was also a member of the Executive Council. He was sworn in the Executive Council June 27, 1826, on a warrant dated: Court at Windsor, May 5, 1825. He sat in Council until July 2, 1829, inclusive. The next meeting was held on August 3, and he was not present when Chief Justice Robinson was sworn in. On August 25 Macaulay, who had received a commission as a judge of the Court of King's Bench, dated July 13, was present and took the oath of office as a judge of the Court of King's Bench, after which he withdrew. See also Hansard, Parl. Deb., N. S., Vol. XXIV, col. 1101.

Colborne in this dispatch says that the seat in the Council was held *ex officio*. This is a mistake shared by Major General C. W. Robinson, C. B., in his "Life of Sir John Beverley Robinson," Blackwoods, Edinburgh and London, 1904. At page 200 the son, speaking of the positions of President

The House of Assembly in Upper Canada showing itself so antagonistic to the government throughout the whole session, it was expected that the Governor would take the sense of the people by ordering a general election; and the death of King George made this course imperative. Mackenzie and the radicals generally were not idle. Mackenzie published a series of letters to Colborne advocating his principles (most of which are now commonplaces in our system), and the agitation became general. But the majority of the voters were not prepared to go the lengths advocated by the advanced reformers; these overdid it, and by one of those revolutions of sentiment not uncommon in any democracy (with or without a capital D) a majority was given the Tory, or government, party.<sup>26</sup>

The House met January 7, 1831, and during the same month arrived a dispatch from Murray to Colborne that the home administration, then tottering toward its fall, had determined to adopt the policy that the Chief Justice should not sit in the Executive Council. Colborne sent this to Robinson and the Chief Justice at

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of the Executive Council and Speaker of the Legislative Council, says: "These posts were filled *ex officio* by the Chief Justice until the Union of the Canadas in 1841, when the occupants of the bench ceased to hold any political office." This statement is wholly erroneous. The Constitutional Act of 1791, 31 George III, c. 31 (Imp.), by sec. 12 provided for the appointment of the Speaker for the Legislative Council by warrant under the great seal of the Province, and as a matter of fact, more than once the Chief Justice was not the Speaker, but someone else was; for example, William Dummer Powell was for some time Speaker of the Legislative Council before the resignation of Chief Justice Scott; and Mr. Justice Jonas Jones was Speaker (1836-1840) during part of the time of Robinson's chief justiceship. Moreover, Vice Chancellor Robert Sympson Jameson was Speaker of the Legislative Council after the union for some years (1841-1843).

Again, there was no necessary relationship between the presidency or even a membership of the Executive Council and the chief justiceship.

<sup>26</sup> Perhaps the normal relative standing of the parties is best shown in the vote, February 1, 1831, when on a division the House voted down, 24 to 17, a motion for an address asking the Governor "whether he has been authorized and directed by His Majesty to summon to the Legislative Council of this Province any person now a member of this House," Journals, House of Assembly, U. C., 1831, p. 35. The vote on the speakership, 24 to 17, may have been partially on personal grounds.

once, January 24, 1831, sent in his resignation of his seat there.<sup>27</sup>

For some reason which does not appear no information was given to the House of Assembly of the dispatch or of the resignation, and that body was allowed to remain in ignorance of the facts.

<sup>27</sup> The following is the official record:

25th January, 1831.

Executive Council Chamber at York, 25th January, 1831. Present: The Honl. John B. Robinson, Chief Justice, Chairn.; The Honorable James Baby; The Honl. & Venl. John Strachan, Archdeacon of York. The Honl. Peter Robinson read the following letters:

Government House, 24 January, 1831.

*Chief Justice to be no longer of the Executive Council—Mr. Secretary Mudge to Presiding Councillor.*

Sir:

I have the honor by the direction of the Lieutenant Governor to transmit to you the enclosed letter from Mr. Chief Justice Robinson and to express His Excellency's regret that, under present circumstances, the Province can no longer receive his able assistance as chairman of the Executive Council, in consequence of His Majesty's Government being of opinion that the Chief Justice of the Province should not take his seat at the Council by virtue of his office.

I have the honor to be,

Signed, Z. MUDGE.

York, 24 January, 1831.

To the Presiding Councillor.

J. B. Robinson, to Sir J. Colborne:

I beg leave to thank Your Excellency for your early communication of the dispatch of Sir George Murray announcing the intention of His Majesty's Government to carry into effect the recommendation of the Committee of the House of Commons that the Chief Justice of these Colonies shall no longer continue to be members of the Executive Council.

Your Excellency will oblige me by communicating to the Council, whenever they may be next summoned, that upon reading in the newspapers, last summer, a statement to the same effect, I applied to Your Excellency to learn whether any such intimation had been conveyed to Your Excellency, and finding that none had been I did not deem it right to take any other step, in consequence of this statement in a newspaper, than to address myself, through Your Excellency, to the Secretary of State, expressing in the first place my conviction that there could be no intention on the part of the government to make an exception in my case to general usage, and begging to be informed whether any new arrangement had been made upon this point which was intended to be applied to the North American Colonies generally.

It appeared to me most probable that a change had been determined upon, and I only waited that official announcement of it which Sir George Murray's letter conveys and which now renders my retirement from the

Mackenzie in this session raised specifically the question of the appointment and powers of the Legislative Council, and that carried with it the question of judges, Chief Justice or others, sitting

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Council a mere act of obedience to His Majesty's pleasure, which I very cheerfully render.

I am grateful for the condescension of Sir George Murray in expressing his regret that he had given me no intimation of this intended change in the Colonial Governments before my present office was conferred upon me, but I am unable to understand upon what ground it is intimated that in the absence of such a communication any other guide could have been taken than the royal commission and instructions to Lord Dalhousie, although these were dated in 1820, since it was that commission which His Excellency Sir James Kempt was administering, and it was under its authority and upon those instructions which accompanied it that the Government of all the Colonies has been since carried on, and is necessarily carried on to this moment. I need hardly say that I could not have acted upon instructions of which I had no knowledge and which are only now announced to be in a state of preparation.

I have the honor to be Your Excellency's faithful and obedient servant,  
Signed, J. B. ROBINSON.

Upon these letters being read, the Chief Justice took leave of the Council and withdrew." Can. Arch. State, I, p. 481.

General Robinson, with the irritating inaccuracy and insufficiency with which he treats of Sir John's career in Canada—he has enough and to spare of his life in England—says: "My father \* \* \* resigned the presidency of the Executive Council about 1832." The date is in the official documents and is certain, while the resignation was of membership and not simply of the presidency of the Executive Council.

The following is the official dispatch from the Secretary of State to Colborne:

*Private.* Downing Street, 1 Novr., 1830.  
Dear Sir:

I have the honor to acknowledge the receipt of your private letter of the 17 Sept. last, with its inclosure from the Chief Justice of Upper Canada, relative to the intention which had been announced in the papers laid before Parliament, of discontinuing that officer as a member of the Executive Council, which Mr. Robinson appears to consider as a measure liable to misconstruction, and to have an effect in the Province prejudicial to his character. I regret extremely that Mr. Robinson should for a moment have felt uneasiness at an alteration which has not the slightest personal reference to him, and which is adopted by His Majesty's Government in compliance with the recommendation of the House of Commons.

On the appointment of Sir James Kempt to the Government of Canada, he was informed by me in July, 1828, that it was not deemed expedient to proceed with his commission and instructions as Governor in Chief until

in that House. All parties were by this time desirous of the independence of the judges of the crown, and the radicals endeavored to have added, as a rider to the address asking for such independence, a further request "that Your Majesty will also be pleased to take the necessary steps for excluding the judges from seats in the Legislative Council in this Province." This was lost by a vote of 18 to 13.<sup>28</sup> But the agitation was not abated; on the contrary, it was intensified, and the absurd attempt at expulsion of Mackenzie from the House<sup>29</sup> did not help to allay public disquiet.

In the Parliamentary recess which followed the prorogation of the Parliament, March 16, 1831, political passion rose to a great height. Mackenzie was everywhere, and everywhere a great power.

When the House met again, November 17, 1831, it was apparent

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the report of the Committee of the House of Commons had been taken into the consideration of His Majesty's Government. The instructions, from various causes which it was impossible to anticipate, were delayed much longer than it was intended, and in point of fact they are only now in the course of preparation. The Committee of the House of Commons, as you are aware, made their report in July, 1828, and several months *subsequently*, viz., in April, 1829, Mr. Robinson was appointed Chief Justice of Upper Canada.

If Mr. Robinson had taken his seat as a member of the Executive Council by virtue of any royal instruction issued after the report of the Canada Committee, I am willing to admit that he might have had reason to consider the proposed alteration as in some degree reflecting personally on himself. I am, however, informed that Mr. Robinson has merely been acting in the Executive Council under the instructions to Lord Dalhousie of 1820, and I therefore cannot but consider that he has taken an erroneous view of the subject. At the same time, I regret that an intimation of the intention of His Majesty's Government to adopt the recommendation of the Canada Committee was not given to Mr. Robinson at the period of his appointment, which would have prevented any possible misconception as to the cause of the Chief Justice being no longer continued as a member of the Executive Council.

I have the honor to be, Dear Sir, your faithful and obed. servt.,

Can. Arch. G., 66, p. 261.

G. MURRAY.

<sup>28</sup> Journals of House of Assembly, U. C., pp. 6, 94, 96. Oddly enough, particularly as Mackenzie was the printer, this does not appear in the Index to the Journals.

<sup>29</sup> The pretext being that he had abused the trust placed in him as printer of the Journals of the House by distributing some copies without the appendix and for political purposes. To the credit of the House, this rankly tyrannous attempt was rendered abortive by a vote of 20 to 15.

that the demands on the part of the reformers of the Province had been of considerable effect. Sir John Colborne, in his speech from the throne on opening Parliament, announced that he had received the royal command for the enactment of a statute that the judges should be appointed *pro vita aut culpa* and not during the royal pleasure.<sup>30</sup>

Nothing was said about the appointment of judges to the Councils, and the pertinacious Mackenzie gave notice next day that he would move an address for the names of members of the Councils, etc., etc. The motion was not made at the time for which notice was given, but a strong hint was thrown out in another address, and November 30, 1831, the Lieutenant-Governor sent a message, "he now acquaints the House of Assembly that in further pursuance of the general design of imparting to this Colony the benefit of the important principle of the British Constitution, the independence of the judges, it is His Majesty's settled purpose to nominate on no future occasion any judge as a member of the Executive or of the Legislative Council, and that the single exception to this general rule will be that of the Chief Justice of Upper Canada, who will be a member of the Legislative Council in order that they may have the benefit of his assistance in framing laws of a general and permanent character; but that His Majesty will not fail to recommend even to that high officer a cautious abstinence from all proceedings by which he might be involved in any political contention of a party nature."<sup>31</sup> This did not satisfy Mackenzie, nor could it; the Chief Justice was the person aimed at. He made his motion December 2, 1831, only to have it postponed by a vote of 21 to 13. An attack upon Mackenzie himself, looking toward his expulsion from the House for alleged libel on the House, began next week, and December 13 he was expelled by a vote of 24 to 15. His motion therefore lapsed.<sup>32</sup> He was at once re-elected, January 2,

<sup>30</sup> Journals, House of Assembly, U. C., 1831, p. 7. I have not found this dispatch in the Canadian Archives.

<sup>31</sup> Journals, House of Assembly, U. C., 1831, pp. 8, 12, 24.

<sup>32</sup> The address proposed asked for the communications with the imperial administration *inter alia*, concerning "the appointment, mode of selection, duties or constitutional character of the Legislative Council and Executive Council \* \* \* and \* \* \* concerning the continuation of the Reverend Doctor Strachan and the judges of the King's Bench in situations which cause them

1832. The same day he published in his newspaper, the "Colonial Advocate," "Articles of Impeachment or Public Accusation" against Colborne, charging him amongst other things with giving "injudicious advice to His Majesty's government \* \* \* in his opinion laid before the House of Commons, that the Chief Justice ought for many reasons to remain a member of the Executive Council"; and he was again expelled, January 7, 1832, without having had a chance to renew his motion.<sup>33</sup> He was re-elected on a poll by 628 votes to 96 for his opponent, the third candidate having retired when he found he could muster only 23 votes. His further experiences are not of moment here. It may, perhaps, be said that he visited England and had many interviews with Goderich (who had succeeded Murray as Secretary of State), resulting in Goderich's strong dispatch to Colborne dealing with the complaints of Mackenzie.<sup>34</sup>

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to take an active part in the executive and legislative business of the Province and to interfere in the regulation of its political affairs." Journals, House of Assembly, U. C., 1831, pp. 29, 32-39.

<sup>33</sup> Do., do., pp. 77-79, 84.

<sup>34</sup> (No. 162) dated from Downing Street, November 8, 1852; Journals, Ho. Assembly, U. C., pp. 95-99. In this dispatch Goderich pays a tribute to the Canadian people which I have not read elsewhere. Referring to Mackenzie's allegation that the existing House of Assembly was chosen by the people in a state of dejection and despondency as to a reform of abuses, Goderich says:

"To sustain his argument he is compelled to draw a picture of the Canadian character in which I am confident that he does \* \* \* great injustice.

"I am well persuaded that no people on earth are less likely to yield themselves to the unmanly weakness of despairing of the public good and of betraying their own most sacred duties in so pusillanimous a spirit."

He absolutely disbelieves "that in the year 1830 an utter despair of vindicating the public liberties had taken possession of the minds of the inhabitants" of Upper Canada. He also repudiates any responsibility for language said to have been used by Chief Justice Robinson when he was a member of the Assembly in respect of education and the proposed university (p. 97). He is not at all sure of the advisability of having bishop or archdeacon in the Councils, but rather thinks they "would be predisposed to the opinion that by resigning their seats they would best consult their own personal comfort and the success of their designs for the spiritual good of the people." He did not know Dr. John Strachan. For Mackenzie's representations to Goderich, see Can. Arch. Q. 380, the whole volume. Goderich's dispatches to Colborne will be found in do., do., Q. 376, pp. 806, 842. Many of Mackenzie's representations are also in Q. 376.

It may be said, too, that Lieutenant-Governor Colborne was not satisfied; we find him urging the appointment of a properly qualified person to preside at the Executive, and suggests that Mr. Justice Macaulay should be appointed President of the Council with a salary.<sup>35</sup> This proposition was not acceded to, and we hear now the last of judges on the Executive Council.<sup>36</sup>

It forms no part of the purpose of this paper to trace the course of agitation resulting in actual rebellion which ultimately brought about responsible government; nor do I say more as to the membership of judges of the Legislative Council.<sup>37</sup>

WILLIAM RENWICK RIDDELL.

*Osgoode Hall, Toronto, December 24, 1921.*

<sup>35</sup> Private letter, Colborne to Robert William Hay, Permanent Under Secretary of State for War and Colonies, from York, January 17, 1834. Can. Arch., Q. 381, p. 80. Colborne was rather given to writing private dispatches to Hay; he even claimed that these would give the Secretary of State information on official matters, for which assumption he was rebuked. Can. Arch. Q. 317, pp. 98, 140. He had, however, written Lord Stanley (who replaced Goderich as Secretary of State for War and Colonies, April, 1833) recommending Mr. Justice Macaulay, who had no objections to take the office, if properly paid, "to preside at the Executive Council, to devote his whole time to public affairs and prepare reports of legal cases," with a salary of not less than £1,000. Dispatch from York, January 7, 1834, Can. Arch. Q. 380, p. 1.

<sup>36</sup> Mackenzie continued to complain, probably with justice, that Colborne allowed himself to be wholly directed by the Chief Justice, and he urged Colborne's removal. Letter, Mackenzie to Lord Stanley, from Toronto, April 28, 1834, Can. Arch. Q. 384, p. 625.

<sup>37</sup> Those interested in the latter topic may consult two articles of mine on "Judges in the Parliament of Upper Canada," 3 MINNESOTA LAW REVIEW (February and March, 1919), pp. 163, 344 sq.; the former topic is part of the general history of Upper Canada, for which may be consulted Kingsford's History of Canada, Vol. IX, X (interesting, but unreliable in matters of detail); Lindsey's Life of William Lyon Mackenzie (accurate if not quite complete); Dent's Rebellion in Upper Canada (frankly radical and with little or no claim to impartiality); General Robinson's Life of Sir John Beverley Robinson (utterly inadequate on this subject); Sir Francis Bond Head's Narrative (as extraordinary a story of self-satisfied wrong-headedness and "how not to do it" as was ever written); and first, last and all the time, the collections in the Dominion Archives at Ottawa.